Supreme Court, U.S.
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No. 06-444

In The

Supreme Court of the United States

BURNAM LELAND LOWELL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether California's Determinate Sentencing Law, by permitting enhanced sentences based on facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004).[1]

2) Whether provisions of California's Determinate Sentencing Law and "three strikes" law, by permitting consecutive sentences based on facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments pursuant to *Apprendi* and *Blakely*.

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[1] The identical question is pending before this Court in *Cunningham v. California*, 126 S. Ct. 1329, 164 L. Ed. 2d 47 (Feb. 21, 2006) (No. 05-6551).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Burnam Leland Lowell, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Third Appellate District, filed on May 3, 2006.

This court has granted certiorari in *Cunningham v. California*, 126 S. Ct. 1329, 164 L. Ed. 2d 47 (Feb. 21, 2006) (No. 05-6551). *Cunningham* addresses whether *Blakely* applies to California's determinate sentencing law. This same issue is addressed herein. In addition, this petition raises an issue beyond the scope of *Cunningham* in that petitioner was given consecutive sentences based upon the factual findings of the sentencing judge. Petitioner asks the court to grant the petition, or hold the petition pending resolution of *Cunningham*.

OPINION BELOW

The unpublished opinion of the California Court of Appeal is attached hereto as Appendix A. The California Supreme Court's order denying review is attached hereto as Appendix B. The transcript of the trial court sentencing hearing is attached hereto as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the California Court of Appeal for which petitioner seeks review was issued on May 3, 2006. The order of the California Supreme Court denying petitioner's timely petition for discretionary

review was filed on July 12, 2006. This petition is filed within 90 days of the California Supreme Court's denial of discretionary review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment 14:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The California statutory provisions and court rules relevant to this petition are reprinted in Appendix D.

STATEMENT OF CASE

Petitioner was convicted by jury on November 27, 2002 of the following violations of the California Penal

Code: section 288.2(a), the distribution or exhibition of lewd materials to a minor, as alleged in count 1 of the information; section 422, threats to commit crime resulting in death or great bodily injury, as alleged in count 2; section 289(j), penetration of genital or anal opening of a person under fourteen by use of a foreign object, as alleged in counts 3 through 5; section 269(a), aggravated sexual assault on a child, as alleged in counts 6 thorough 10; section 288(a), lewd or lascivious act upon a child under age fourteen, as alleged in counts 11 through 13; section 288a(c)(1), oral copulation with a child under age fourteen, as alleged in counts 15 through 18 and count 20; section 286(c)(1), sodomy with a person under age fourteen and more than ten years younger than defendant, as alleged in counts 19 and 45 through 48; and section 597(b), abusing an animal, as alleged in counts 27 through 44. Clerk's Transcript ("CT") 1042, 1229.

In a bifurcated proceeding, the court found that petitioner had suffered a prior prison term pursuant to Penal Code section 667.5(b); a prior "serious felony," as defined by Penal Code section 1192.7; and a prior felony as defined in Penal Code section 667(d), and listed in sections 667.5(c), and 1192.7(a).[2] CT 2359.

At petitioner's judgment and sentencing on February 20, 2004, the trial court found true four aggravating factors: the victim was particularly vulnerable; the petitioner was on parole at the time of the offense; petitioner's performance on parole was unsatisfactory; and that the petitioner had engaged in violent conduct indicating a serious danger to

[2] The latter provision is part of California's so-called "three strikes" sentencing law.

society. The court did not find any mitigating factors. App. C, 42-43, 45.

For counts 6 through 10, alleging the violation of Penal Code section 269(a), appellant was sentenced to an aggregate indeterminate term of 150 years to life. The indeterminate term was computed by doubling the 15 to life term for each of the Penal Code section 269(a) convictions, due to appellant's "strike" prior conviction pursuant to Penal Code section 667(a)(1). These five 30 to life terms were ordered to run consecutive to each other and to the determinate term. App. C, 43, 49.

For the remaining counts, petitioner was sentenced to an aggregate determinate sentence of 88 years, eight months. This term was computed by selecting the upper term (eight years)[3] for count 3, a violation of Penal Code section 289(j), then doubling it, as a result of petitioner's "strike" prior, for a base term of 16 years. Consecutive terms for the remaining counts were imposed utilizing a one-third the middle term doubled formula. A five-year enhancement for petitioner's prior serious and violent felony and a one-year "prison prior" enhancement were then added to the determinate term. The court ordered that the indeterminate term run consecutive to the determinate term. The total prison sentence, taking into account both the indeterminate and determinate terms, was 238 years, eight months to life. App. C, 49.

In the state Court of Appeal, petitioner argued that the judicial fact finding at sentencing violated his federal constitutional right to a jury trial and proof beyond a

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[3] Penal Code § 289(j) provides a sentencing "triad" of three (lower term), six (middle term) and eight (upper term) years.

reasonable doubt, citing the Sixth and Fourteenth Amendments and this Court's decisions in *Blakely v. Washington*, 542 U.S. 296 (2004), *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). Specifically, petitioner argued that the sentencing court's selection of the upper term and imposition of consecutive sentences violated the United States Constitution. Appellant's Opening Brief, pp. 79 through 94.

The California Court of Appeal rejected petitioner's argument that the judicial fact finding resulting in an upper term sentence violated *Blakely*. App. A, 28. The court held that this result was mandated by the California Supreme Court's opinion in *People v. Black*, 35 Cal.4th 1238, 113 P.3d 534, 29 Cal.Rptr.3d 740 (Cal. 2005). App. A, 28. Citing the *Black* decision of the California Supreme Court, the Court of Appeal also held that the rule of *Apprendi* and *Blakely* did not apply to the State of California's consecutive sentencing scheme, and that a statute requiring rather than merely permitting a consecutive sentence does not implicate the rule of *Apprendi* and *Blakely*. App. A, 27. As a result of non-*Blakely* error, the Court of Appeal reversed the convictions on counts 5 and 13, reducing petitioner's sentence by eight years for a total remaining determinate prison term of 80 years, eight months. App. A, 32. Counts 19, 45, 46, 47 and 48 were also reversed but this action did not reduce petitioner's sentence.

Petitioner sought discretionary review of the *Blakely* issue in the California Supreme Court, making the same federal constitutional argument set forth above. Petition for Review, page 29. The California Supreme Court denied the petition for review "without prejudice to any relief to which defendant might be entitled after the United States

Supreme Court determines in *Cunningham v. California*, No. 05-6551, the effect of *Blakely v. Washington* (2004) 542 U.S. 296 and *United States v. Booker* (2005) 543 U.S. 220, on California law." App. B, 33.

REASONS FOR GRANTING THE PETITION

I.

THIS CASE, IN WHICH A *BLAKELY* CHALLENGE TO CALIFORNIA'S SENTENCING SCHEME WAS PRESENTED AND REJECTED IN THE STATE COURTS, SHOULD BE HELD FOR DISPOSITION PENDING THIS COURT'S DECISION IN *CUNNINGHAM v. CALIFORNIA*, NO. 05-6551.

In *Cunningham v. California* this Court will decide whether California's Determinate Sentencing Law ("DSL") violates the Sixth Amendment jury trial guarantee, and the Fourteenth Amendment guarantee of proof beyond a reasonable doubt.

As addressed more fully in the *Cunningham* certiorari petition, California law authorizes imposition of an "upper term" sentence (rather than the presumptive "middle term") only if the judge finds aggravating circumstances over and above the elements of the offense of conviction. Cal. Pen. Code § 1170(b); California Rules of Court, rules 4.420, 4.421 and 4.423; App. D, 51-55, 59.

In this case, as in *Cunningham*, the sentencing judge based the upper term sentence on the judge's own factual findings of "aggravating circumstances," specifically, that the victim was particularly vulnerable, the petitioner was on parole, his performance on parole was unsatisfactory,

and that he engaged in violent conduct indicating a serious danger to society. App. C, 42-43, 45. Because those additional factual findings were necessary for California law to authorize an upper term sentence of eight years (doubled to 16 years pursuant to provisions of the "three strikes" sentencing law) rather than a mid-term sentence of six years, the judge's adjudication of those facts without a jury trial and finding beyond a reasonable doubt deprived petitioner of his Sixth Amendment jury trial guarantee and his Fourteenth Amendment guarantee of due process, just as in the pending *Cunningham* case and in *Blakely v. Washington*, 542 U.S. 296 (2004). This case presents the same question and should be held pending a decision in *Cunningham*.

The *Blakely* claim in this case was preserved in state court. Appellant argued that he was sentenced in violation of *Blakely*. The state court of appeal denied the claim on the merits, ruling that it was bound by the California Supreme Court's decision in *Black, supra,* 35 Cal.4th 1238. The California Supreme Court denied review, specifying that it was without prejudice to any relief to which the petitioner might be entitled as a result of this Court's resolution of *Cunningham v. California*, No. 05-6551. App. B, 33.

This Court's disposition of *Cunningham* will be determinative of the legality of petitioner's sentence. Accordingly, this case should be held pending the decision in *Cunningham*.

II.

PETITIONER WAS SENTENCED CONSECUTIVELY BASED UPON FINDINGS MADE BY THE COURT IN VIOLATION OF *BLAKELY*. THE PROPRIETY OF BASING CONSECUTIVE SENTENCES ON A COURT'S FACTUAL FINDINGS REPRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION WARRANTING A GRANT OF CERTIORARI.

The determinate portion of petitioner's sentence was 80 years, eight months. Of that term, 64 years, eight months was comprised of consecutive terms. In addition, the indeterminate term was ordered to run consecutive to the determinate term. App. A, 30; C, 43, 49. The Court of Appeal affirmed the consecutive sentencing based upon findings that the offenses were separate and distinct and that the petitioner had time to reflect on his actions in between the acts. App. A, 30; C, 37-39, 42. The imposition of consecutive terms violated *Blakely* in that the findings necessary to sentence consecutively were determined by the court, not the jury.

Pursuant to Penal Code section 669, multiple sentences, by operation of law, run concurrent unless the court orders otherwise. App. D, 57. In order to sentence consecutively pursuant to California's DSL, the trial court must find one or more factors listed in California Rules of Court, rule 4.425. App. D, 56. Rule 4.425 provides that "[a]ny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences. . . ." See California Rules of Court, rules 4.421, 4.423. App. D, 51-56. Rule 4.425 lists other factual findings that permit a court to impose consecutive sentences. These findings are that 1) the

crimes and their objectives were predominantly independent of each other; 2) the crimes involved separate acts of violence or threats of violence; and 3) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. App D, 56. Courts are not permitted to use facts that are an element of the offense to justify a consecutive sentence. California Rules of Court, rule 4.425(b); App. D, 56. Therefore, in order to sentence a defendant to consecutive terms, a court must necessarily make factual findings that were neither presented to nor found true beyond a reasonable doubt by a unanimous jury.

California's "three strikes" law is a separate sentencing scheme applicable to defendants with qualifying prior convictions. Part of this scheme involves a limitation upon the ability of courts to impose concurrent sentences. Penal Code sections 1170.12(a)(6) and 667(c)(6) provide that "if there is a current conviction for more than one felony count *not committed on the same occasion, and not arising from the same set of operative facts*, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)." App. D, 59-60; emphasis added. Similarly, Penal Code sections 1170.12(a)(7) and 667(c)(7) provide that "if there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." App. D, 59-60. The California Supreme Court has construed "as described in paragraph (6)" to mean "not committed on the same occasion, and not arising from the same set of operative

facts." *People v. Hendrix*, 16 Cal.4th 508, 513 (1997). Thus, under both provisions, which were applicable in petitioner's case, concurrent sentencing for an offense was not permissible if the court found the offenses *were not* committed on the same occasion or *did not* arise from the same set of operable facts. In the event concurrent sentencing is permitted, the court would then apply the consecutive sentencing provisions of the DSL, discussed above.

Thus, under the "three strikes" law, the court must determine facts not proven to the jury in determining whether concurrent sentencing is permissible. The utilization of facts determined by the court rather than by a jury as a basis not to impose a concurrent sentence is prohibited by *Blakely* which provides " . . . the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment' [citation] and the judge exceeds his [or her] proper authority." *Blakely v. Washington, supra*, 542 U.S. at pp. 303-304, 124 S.Ct. at p. 2537, original italics.

The trial court's factual findings that the various criminal offenses for which the petitioner was convicted were separate and distinct crimes are reflected in the transcript of the sentencing proceedings. App. C, 37-39, 42. The probation department also concluded the offenses were "distinct acts of violence," and that in regard to the digital penetration counts, "the defendant would have had time to reflect on his actions before moving on to the next act." CT 1314. The court in this case necessarily relied

upon facts that were not found true by the jury, thereby violating *Blakely*.

The Court of Appeal rejected petitioner's *Blakely* challenge to the imposition of consecutive sentences, holding that "the rule of *Apprendi* and *Blakely* does not apply to our state's consecutive sentencing scheme." App. A, 25. The *Blakely* decision has created a complex of issues that must be resolved to assist the functioning of the state and federal trial courts. The question of whether *Blakely* applies to the decision to impose consecutive sentences is an important constitutional question that should be settled by this Court and warrants a grant of certiorari. Supreme Court Rules, rule 10(c).

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for writ of certiorari. At a minimum this Court should hold the case for disposition pending its decision in *Cunningham v. California* (No. 05-6551). Certiorari may thereafter be granted, the judgment of the California Court of Appeal vacated, and the matter remanded for further proceedings in light of *Cunningham* ("GVR").

DATED: September 26, 2006

Respectfully submitted,

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APPENDIX A

2006 WL 1163806

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Yolo)

- - - -

THE PEOPLE, Plaintiff and Respondent, v. BURNAM LELAN LOWELL, Defendant and Appellant.	C046314 (Super. Ct. Nos. CRF00-682, CR00-681, CR00-5718, CR00-5484)

(Filed May 3, 2006)

Defendant Burnam Lelan Lowell was sentenced to a lengthy prison term after a jury found him guilty of numerous criminal offenses. On appeal, defendant raises a variety of contentions. For reasons that follow, we shall reverse the convictions for penetration with a foreign object (count 5), lewd conduct with a child (count 13), and sodomy with a child (counts 19, 45, 46, 47, and 48), and direct the trial court to dismiss those counts. In all other respects, we shall affirm the judgment as modified.

FACTS

Defendant was born on May 1, 1974. His oldest son (the victim) was born in March 1993. Ever since the victim

was two years old, defendant's aunt and her husband, Charlene and Roy Schaible,[1] have been legal guardians of the victim, who apparently never lived with his biological mother.

From June 1997 until January 2000, the victim lived with defendant, although the guardianship continued. During that time, the household included the victim, defendant, defendant's wife, Barbara Lowell, defendant's and Barbara's two younger children, and Barbara's daughter by a prior relationship. Defendant's brother and his wife, Matt and Deborah Lowell, and defendant's sister, Samantha Lowell, had homes nearby defendant's residence.

Defendant bred American Staffordshire terriers, also known as American pit bull terriers. In January 2000, he had 18 to 22 dogs, including a number of puppies. The victim helped take care of the dogs.

Defendant would sometimes go on a drinking binge. This would lead to arguments with Barbara. On those occasions, Barbara would take the children and leave. There was ample evidence that at least some of the time, she would leave the victim, who was not her child, with defendant. On some of those occasions, defendant's mother, Merrena Gonzales, would pick up the victim and take him to her home.

On the weekend of January 7 and 8, 2000, defendant was on a drinking binge. Barbara took the children, except

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[1] Many witnesses have the same last names. Therefore, after our initial reference to a witness, we will use the witness's first name for simplicity and to avoid confusion.

the victim, and left. On January 8, 2000, a number of persons, including Charlene, were at Samantha's house to help her move. Defendant and the victim came to the house. Defendant appeared drunk at the time. Later in the day, Charlene overheard the victim tell his cousin that he was scared. When Charlene asked if everything was all right, the victim started crying, wrapped his arms around her, and said he was scared of defendant.

Charlene decided to take the victim to her house for a few days. When Charlene told defendant what she intended to do, he began yelling and said he would get people on the reservation to stop her.[2] Defendant asked the victim if he was scared of defendant. The victim looked frightened or embarrassed and said that he was. As Charlene took the victim away, defendant told her that in nine days, when defendant was off parole, he was going to "kick [her] ass" and that he would "come after [Charlene] and take [her] out." Defendant then became emotional and teary-eyed. As Charlene drove away with the victim in the backseat, defendant pointed in the window and looked at the victim as though warning him to keep his mouth shut.

Shortly thereafter defendant left the area. He testified that he went to his brother's home in Williams and later left for Colusa, where he intended to gamble at a casino. He fell asleep and drove into a ditch. Eventually, Barbara picked up defendant in Colusa and took him to where she was staying in Davis.

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[2] It appears the homes of defendant's brother and sister are on a Native American reservation. Although some of the witnesses referred to defendant's home as being on the rancheria, at least one witness said it is just off the reservation land.

On January 11, 2000, an animal control officer received a report that dogs were not receiving proper care at defendant's residence. The officer went to the home and discovered numerous adult dogs; most were in kennels, one was chained to a stake, and two were running loose. At least one of the adult dogs had wounds. The officer saw several living puppies, one with significant injuries, and at least three dead puppies with significant wounds, including decapitation. One puppy bore shoe marks. The animal control officer testified that the dogs lacked consumable food and water and did not have shelter from the weather. Based upon the accumulation of feces, he estimated that the kennels had not been cleaned in two weeks.

On January 19, 2000, Charlene and the victim were traveling into town when the victim asked whether he would have to go back to defendant. Charlene told him that if defendant petitioned for his return, a judge might decide the victim should go back and that he would have to tell the judge why he was scared. The victim wanted to know the kind of questions that the judge would ask, so Charlene said she would act like "Judge Judy." She asked the victim why he was scared. When he answered "because," she told him that was not reason enough. The victim then said that defendant did "nasties" to him. After more discussion, Charlene notified law enforcement.

The district attorney, law enforcement, and child welfare services in Yolo County developed a protocol for a multidisciplinary interview referred to as an MDI. Debbie Presti, a social worker with the child welfare services department and a certified interviewer, conducted an MDI with the victim. In the interview, the victim used a doll and drew pictures to illustrate what happened. He reported that defendant touched the victim on his front and

bottom "privates," that the defendant made the victim touch defendant's privates, and that defendant orally copulated the victim. The first time such acts occurred was when the victim was five years old. The last time was the night before Charlene took him away when he was six years old. Defendant was always drunk when he did these things. Defendant also made the victim watch pornographic movies; the victim drew pictures to show the conduct portrayed in the movies.

Law enforcement officers obtained a warrant and searched defendant's house. They discovered two pornographic videotapes in the location indicated by the victim. The videotapes depicted the type of conduct that the victim had described.

The victim subsequently told Charlene that in addition to the other conduct, defendant had sodomized him. A second MDI was held in which the victim reported that defendant sodomized him on some occasions. He said he had not reported that before because he was "too embarrassed and stuff." He finally told Charlene because, in the victim's words, "God gave me the – the soul and the guts to tell her that night. . . ."

Both MDI sessions were videotaped, and the tapes were played to the jury. At trial, the victim testified about defendant's sexual conduct with him.

Defendant was charged with distributing or exhibiting lewd material to a minor (Pen.Code, § 288.2, subd. (a); further section references are to the Penal Code unless otherwise specified); making a criminal threat (§ 422); three counts of sexual penetration with a foreign object upon a child under the age of 14 years and more than 10 years younger than the perpetrator (§ 289, subd. (j)); five

counts of aggravated sexual assault by sodomy upon a child under the age of 14 years and 10 or more years younger than the perpetrator (§ 269, subd. (a)); three counts of lewd conduct with a child under the age of 14 years (§ 288, subd. (a)); nine counts of oral copulation with a child under the age of 14 years and more than 10 years younger than the perpetrator (§ 288a, subd. (c)(1)); five counts of sodomy with a child under the age of 14 years and more than 10 years younger than the perpetrator (§ 286, subd. (c)(1)); three counts of killing, wounding or torturing an animal (§ 597, subd. (a)); and 18 counts of abusing an animal (§ 597, subd. (b)). As sentencing enhancements, the information charged that defendant had a prior serious felony conviction and had served a prior prison term.

On defendant's section 1118.1 motion, the trial court dismissed three counts of oral copulation with a child. Another count of oral copulation with a child was dismissed pursuant to section 1385 after the jury could not reach a verdict on that charge. Defendant was found not guilty of the three counts of killing, wounding, or torturing an animal. The jury convicted him on all other counts and, in a bifurcated proceeding, the trial court found the enhancement allegations to be true.

DISCUSSION

I

Defendant contends the trial court erred in denying his motion to sever the animal abuse counts for separate trial. We disagree.

"Two or more offenses 'of the same class,' or 'connected in their commission,' may be charged and tried together,

but the trial court may sever counts in the interest of justice. (§ 954.) When exercising its discretion, the court must balance the potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial. [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 126.)

"Joinder is generally proper when the offenses would be cross-admissible in separate trials, since an inference of prejudice is thus dispelled. [Citations.] However, joinder is often permissible even when cross-admissibility is not present. Because of the factors favoring joinder, a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial. [Citation.] In determining potential prejudice from the joint trial of non-cross-admissible charges, the court should evaluate whether (1) certain of the charges are unduly inflammatory, (2) a 'weak' case will be unfairly bolstered by its joinder with other charges, and (3) any of the charges carries the death penalty. [Citations.]" (*People v. Arias, supra*, 13 Cal.4th at pp. 126-127.)

"To demonstrate that a denial of severance was reversible error, defendant must '"clearly establish that there [was] a substantial danger of prejudice requiring that the charges be separately tried."' [Citations.] We examine a pretrial severance ruling on the record then before the court. [Citation.] Even if the ruling was correct when made, we must reverse if defendant shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process. [Citation.]" (*People v. Arias, supra*, 13 Cal.4th at p. 127.)

Here, in response to defendant's motion for a severance, the People asserted the offenses were connected in

their commission. The animal abuse offenses and sexual abuse offenses all occurred at defendant's house. Most of the witnesses would be common to both groups of offense. It was anticipated the victim would testify that defendant let the dogs fight, that on one occasion a wounded dog went untreated and died, and that these events frightened the victim. And it was noted that the uncared for and wounded dogs were discovered only days after Charlene took the victim from defendant's custody and that such removal could have caused defendant to injure and kill the puppies.

The trial court denied the motion to sever for two reasons. First, the court reasoned that the manner in which defendant treated the dogs could be circumstantial evidence of intimidation of the victim and might explain why he submitted to molestation and kept quiet about it. Second, the court reasoned that the sexual molestations could establish motive for what happened to the dogs on the weekend Charlene took the victim from defendant's custody.

At trial, there was some evidence in support of these theories. The victim testified that a dog named Shotgun was injured in a fight with another dog and suffered fatal injuries. He stated that sometimes defendant would put dogs together and let them fight. According to the victim, defendant would watch and would use a hose to stop the fight if it got "too crazy." However, while the victim testified he was afraid of defendant, he did not specifically relate his fear to defendant's treatment of the dogs.

Defendant's mother testified that during 1999, defendant would allow the victim to stay with her some of the times when Barbara left the house because of defendant's

drinking; but that defendant then stopped allowing the victim to stay with her. She testified his stated reason was the victim "tells [defendant's mother] everything." Charlene was the victim's guardian with whom he had lived for a portion of his life and whom he often called "Mom."

Defendant would have reason to fear that if the victim stayed with Charlene he might reveal the molestations. That would explain defendant's anger when Charlene took the victim home with her. And that and defendant's drinking could serve to explain why he might go on a violent rampage toward the dogs before leaving the area.

While these theories of cross-admissibility are not compelling, they are logical inferences from the evidence. Hence, to warrant reversal, defendant must demonstrate that joinder actually resulted in "gross unfairness," amounting to a denial of due process of law. (*People v. Arias, supra*, 13 Cal.4th at p. 127.) He has not done so.

In attempting to demonstrate prejudice, defendant asserts the "strong" case of animal abuse produced a spillover effect that unfairly strengthened or bootstrapped the "weak" sexual abuse case. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120-1121.) Focusing on charges involving the dead puppies, he asserts their injuries were grotesque and the dead puppy evidence was inflammatory. But the argument loses much of its force when we keep in mind that the jury found defendant not guilty of killing or wounding the puppies. If the jurors' passions were inflamed by the dead puppy evidence, it would be more logical that they would convict on those charges, rather than acquit defendant but enter a spillover conviction on other charges.

The remaining animal abuse charges were neither particularly strong nor particularly inflammatory. The county animal control officer testified that on January 11, 2000, the dogs lacked consumable food and water, but that the dogs otherwise were in good shape, did not appear malnourished, and were not aggressive. It appeared that defendant had left the area without making adequate provision for the dogs' care, but the lack of care did not appear to have been long-standing or continuous.

We disagree with defendant's view that the sexual abuse charges presented a weak case. As is often the case with child molestation charges, the revelations of the child constituted the primary evidence. Many children who have been sexually abused are embarrassed and can have difficulty explaining what happened. The victim was no exception. However, the two MDI interviews and the victim's trial testimony indicate the victim was a credible witness with respect to the fact that the molestations occurred. Indeed, in ruling on a motion for a new trial, the trial court stated that if the matter had been tried to the court, it would have credited the victim's testimony as the jury did. In addition, parts of the victim's revelations were corroborated. For example, pornographic videos depicting the conduct described by the victim were located where he said they would be. And in his interviews and at trial, the victim said defendant was always drunk when he engaged in sexual misconduct, which would correspond to times Barbara left the house with the other children. Barbara claimed that she left the victim with defendant only one time; however, defendant's mother reported that Barbara left the house about every other weekend and that most of the time she did not take the victim with her. Also, while defendant suggested that Charlene instigated the

accusations because she wanted to get child support from him, he was unable to present credible evidence that Charlene acted from anything but concern for the victim's welfare.

In summary, the evidence of the puppy deaths may have been somewhat gruesome; but sexually molesting a young child is far more opprobrious. The possibility that the passions of the jury were inflamed by evidence of dead puppies is dispelled by the acquittals on the charges of killing or wounding the puppies. We reject the contention that the sexual abuse charges presented a weak case. And, particularly in view of the acquittals for the puppy deaths, we conclude the sexual abuse charges were not unfairly strengthened or bootstrapped by evidence of animal abuse. For these reasons, and upon consideration of the entire record, we conclude defendant has not shown that the joint trial of the charges resulted in gross unfairness amounting to the denial of due process. Hence, reversal of the judgment on this ground is not warranted.

II

Defendant contends his trial attorney provided ineffective assistance of counsel by failing to renew the motion to sever. The contention fails.

The severance motion was heard and denied by Judge Timothy Fall. The matter was later assigned for trial before Judge Michael Sweet. During pretrial motions, defense counsel asked the court to review and to limit the use of photographs of the dead puppies. Judge Sweet inquired of the connection between the animal offenses and the sexual offenses. The prosecutor stated there would

be common witnesses and the victim would testify regarding some of defendant's behavior with respect to the dogs, including allowing them to fight. However, the parties agreed there would be no evidence that the victim witnessed the injuries to the dogs occurring between January 8 and January 11, 2000, and there would be no claim that those injuries were used to intimidate the victim.

Saying he raised the question to determine the probative value of the photographs, Judge Sweet remarked: "I thought perhaps this was a connection. But both sides are saying that was no connection. I won't even ask why were they joined. That's rhetorical."

At a subsequent hearing pursuant to Evidence Code section 402, the victim stated he witnessed defendant letting the dogs fight but said that did not scare him when defendant sexually assaulted him. According to the victim, seeing the dogs fight made him fearful of the dogs but not of defendant. Judge Sweet commented: "The dogs fighting is irrelevant to the [aggravated sexual assault] but it probably is relevant as to some of the other charges. So I'm permitting it for those other charges but not as to show fear by the victim regarding the [aggravated sexual assaults]." The judge added that the dog fight evidence would be relevant and permissible as to the animal abuse charges.

Defendant contends defense counsel should have renewed the motion to sever based upon (1) Judge Sweet's comments with respect to photographs of the dead puppies, (2) evidence at the Evidence Code section 402 hearing, and (3) the failure of evidence at trial to show that the dog fighting made the victim fearful of defendant during the sexual offenses.

The burden of proving a claim of ineffective assistance of counsel is upon defendant. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) To meet this burden, he must prove (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the defense to prejudice, i.e., there is a reasonable probability that but for counsel's failings, the result would have been more favorable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [80 L.Ed.2d 674, 693, 698]; *People v. Bell* (1989) 49 Cal.3d 502, 546 .)

We already have discussed why defendant has not shown prejudice from joint trial of the offenses. For the same reasons, we conclude defendant has not demonstrated prejudice from the failure of trial counsel to renew the motion to sever.

III

Next, we reject defendant's contention that the trial court should not have allowed graphic photographs of the dead puppies to be introduced into evidence.

Before trial, the trial court reviewed photographs of the dead puppies, excluded some of the photographs, and ruled others could be used at trial. In doing so, the court weighed the probative value of the photographs against their potential for prejudice.

Victim and crime scene photographs are always relevant to prove how a crime occurred. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1170.) When it is claimed that such photographs are unduly gruesome or inflammatory, it lies within the broad discretion of the trial court to determine

whether the probative value of the photographs is clearly outweighed by their prejudicial effect. (*People v. Heard* (2003) 31 Cal.4th 946, 975-976.) We apply the deferential abuse of discretion standard in reviewing the court's determination. (*People v. Pollock, supra*, 32 Cal.4th at p. 1171.)

Defendant claims the defense position was not that the puppies were not killed by a human being but that defendant did not do it; therefore, the photographs lacked probative value. However, the defense did not offer to stipulate to a human agency, and it was incumbent on the People to prove beyond a reasonable doubt that the puppies were maliciously and intentionally maimed, mutilated, tortured, or wounded, or maliciously and intentionally killed by a person. (§ 597, subd. (a).) The evidence indicated the condition of the puppy bodies was caused at least in part by actions of the adult dogs. The photographs had substantial probative value in illustrating that some of the wounds were caused by a human agency. Thus, the trial court did not abuse its discretion in admitting the photographs.

In any event, defendant's acquittals on the charges arising from the puppy deaths dispel a claim of prejudice from admission of the photographs.

IV

Defendant contends counts 3 and 5, alleging penetration with a foreign object (§ 289, subd. (j)), are based on the same criminal act, as are counts 11 and 13, alleging lewd conduct with a child (§ 288, subd. (a)). Thus, he argues, the terms imposed for count 5 and for either count 11 or count 13 must be stayed (§ 654).

The People concede the issue and ask that we either remand for resentencing or stay the sentences for counts 5 and 13.

As we will explain, the convictions for counts 5 and 13 must be reversed and those counts must be dismissed.

The issue arose when separate informations were consolidated. A preliminary hearing held on June 1, 2000, supported the first information (case No. 682). At the preliminary hearing, an officer who observed the first MDI interview of the victim described acts of digital penetration and lewd conduct reported by the victim to have occurred on January 7, 2000. Defendant was held to answer, and those acts were alleged as counts 2 and 3 in case No. 682. The court later granted a defense motion pursuant to section 995 and dismissed counts 2 and 3 in case No. 682.[3]

The acts that were alleged as counts 2 and 3 in case No. 682 were recharged when the People filed a complaint in case No. 5718. At the preliminary hearing on this complaint, an officer testified about the victim's report of the same acts that had formed the basis for counts 2 and 3 in case No. 682. Defendant was held to answer and the alleged dates of the offenses were amended to charge that the acts occurred between December 31, 1999, and January 8, 2000.

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[3] The motion to dismiss was granted because the officer who testified at the preliminary hearing erroneously reported that Charlene took the victim from defendant's custody on December 8, 1999, rather than January 8, 2000. If that were true, defendant could not have committed acts on January 7, 2000, as charged in case No. 682.

The trial court granted the People's motion to consolidate case Nos. 682, 5718, and 5484. Count 3 in the consolidated information charged digital penetration on or about January 7, 2000, which had been the dismissed count 3 in case No. 682. Count 5 charged digital penetration between December 31, 1999, and January 8, 2000, which was count 2 in case No. 5718. As previously noted, this was based upon the same criminal act as count 3 from case No. 682. Count 11 alleged lewd conduct with a child on January 7, 2000, which had been the dismissed count 2 in case No. 682. Count 13 of the consolidated information charged lewd conduct between December 31, 1999, and January 8, 2000. As we have noted, this was based upon the same criminal act as count 2 from case No. 682.

It was proper for the People to refile the charges alleged as counts 2 and 3 in case No. 682 as counts 1 and 2 in case No. 5718. (§ 999; *Anderson v. Superior Court* (1967) 66 Cal.2d 863, 867.) But it was error to include the dismissed counts from case No. 682 as charged counts in the consolidated information. The result was, as defendant asserts, redundancy in counts 3 and 5 and counts 11 and 13.[4]

The error cannot be corrected by staying service of the terms imposed on counts 5 and 13.

When an act or indivisible course of conduct may be punished in different ways by different provisions of law,

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[4] By failing to object pretrial to the duplicative charges in the information, defendant has forfeited the right to raise procedural claims on appeal. (*People v. Polowicz* (1992) 5 Cal.App.4th 1082, 1094-1095.) However, the contention that a defendant has been convicted and punished twice for the same act is an issue that cannot be forfeited. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 16-17.)

the general rule is multiple convictions may be sustained, but the defendant may be punished only pursuant to the provision that provides the longest potential term of punishment. (§ 654; *People v. Ortega* (1998) 19 Cal.4th 686, 692.) In that circumstance, the remedy is to stay service of sentence on all but one conviction. (*People v. Ortega, supra*, 19 Cal.4th at p. 692.)

However, there is a exception to this general rule. A single criminal act cannot support multiple convictions for both a greater offense and any necessarily included offenses. (*People v. Ortega, supra*, 19 Cal.4th at pp. 692-693.) Likewise, a single criminal act cannot support multiple convictions under the same statutory provision. (*People v. Craig* (1941) 17 Cal.2d 453, 458-459.) In those circumstances, multiple convictions are precluded; only one conviction can stand. (*People v. Ortega, supra*, 19 Cal.4th at p. 700; *People v. Moran* (1970) 1 Cal.3d 755, 763.)

Here, the charges in counts 3 and 5 and in counts 11 and 13 were based on the same criminal acts, and but one conviction for each act may be upheld.

We accept defendant's contention and the People's concession that the convictions for count 5, alleging digital penetration, and count 13, alleging lewd conduct with a child, are duplicative of the convictions on counts 3 and 11, respectively. Hence, counts 5 and 13 must be reversed, and we shall direct the trial court to dismiss those counts.

V

In defendant's view, the evidence did not establish with sufficient certainty the number of sex acts committed. He argues we should affirm only one, or at most two,

convictions for each of the types of sex act charged. We are not persuaded.

In *People v. Jones* (1990) 51 Cal.3d 294, California's Supreme Court considered the difficult issues that arise when a young victim testifies a "resident child molester" has committed repeated acts of molestation over a substantial period of time "but, lacking any meaningful point of reference, is unable to furnish many specific details, dates or distinguishing characteristics as to individual acts or assaults." (*Id.* at p. 299.) Such testimony, referred to as "generic," raises the question of the minimum quantum of proof necessary to support conviction on one or more counts. (*Id.* at p. 314.)

Rejecting the view of some of the Courts of Appeal that generic testimony is insufficient to support conviction (*People v. Jones, supra*, 51 Cal.3d at p. 315), the Supreme Court said: "The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not

essential to sustain a conviction." (*Id.* at p. 316, italics in original.)

In *People v. Newlun* (1991) 227 Cal.App.3d 1590, the appellant was convicted of 15 counts of lewd conduct with a child. The victim testified the appellant had penetrated her vaginally 11 times, but moments later said it was only five times. She gave no testimony whatsoever about the number of acts of sodomy and oral copulation the appellant committed. (*Id.* at p. 1601.) This court concluded that the victim's testimony alone was not sufficient to support 15 convictions. However, unrebutted medical evidence established the injuries and abnormalities detected would have required at least six vaginal penetrations and at least 12 to 14 anal penetrations. (*Id.* at p. 1602.) Because this evidence established at least as many acts as were charged, it supported the appellant's convictions. (*Ibid.*)

In *People v. Crow* (1994) 28 Cal.App.4th 440, the appellant was charged with eight counts of lewd conduct with a child, and the jury found him to be guilty of three counts. The victim testified the appellant had committed at least five acts of intercourse, had probably touched her breasts 10 times, and had touched her vagina with his fingers at least three times. (*Id.* at p. 447.) The Court of Appeal found the evidence sufficient, noting that the number of acts described easily exceeded the number of convictions. (*Ibid.*)

In *People v. Matute* (2002) 103 Cal.App.4th 1437, the appellant was convicted of 15 counts of raping his daughter, who testified that the appellant raped her a couple of times a week after the family moved to California and that a week never went by without a rape. (*Id.* at pp. 1440, 1449.) The 15 charged counts represented one count for

each month the family lived in California, which the prosecutor described as conservative. (*Id.* at p. 1449.) The Court of Appeal found the evidence sufficient to support the convictions. (*Id.* at pp. 1446-1447.)

Here, there is no question the victim sufficiently described the acts committed. He described acts of digital penetration of his anus, sodomy, oral copulation of the victim by defendant, and incidents in which defendant touched the victim's penis or made the victim touch defendant's penis. There also is no question the testimony sufficiently described the time period the acts occurred, to assure that they were within the applicable limitations period. All of the acts occurred while the victim lived with defendant, between June 1997 and January 2000. The question presented is whether the victim's testimony described the number of acts committed with sufficient certainty to support the convictions.

Although the victim was able to relate that defendant sexually assaulted him multiple times, he had difficulty specifying the number of times each act occurred. The victim testified that the acts of molestation occurred when he first started living with defendant, they continued through the middle of the time he lived with defendant, and they also happened at the end of the time he lived with defendant. The victim said the assaults occurred every time defendant drank alcohol. The assaults always occurred when Barbara and the other children were gone. There was evidence to indicate this was a frequent occurrence during the time period in question. The victim said he was left alone with defendant "a lot" and estimated it was around 15 times.

With respect to digital penetration, the victim first testified this type of act occurred over five times. He could not remember if it was more than ten times. He later said it was more than five but less than ten times. Because one conviction for digital penetration must be reversed (see part IV, *ante*), defendant stands convicted of two counts of digital penetration. The evidence was sufficient to support these convictions. (*People v. Matute, supra*, 103 Cal .App.4th at pp. 1446-1447; *People v. Crow, supra*, 28 Cal.App.4th at p. 447.)

With respect to sodomy, the victim testified that during the time he lived with him, defendant "kept sticking his private part in my butt." He testified the act occurred more than five times on different days. On the occasion just before Charlene took him away, the act was repeated more than three times on the same night. Later in his testimony, the victim said the act occurred around six times on different nights. On some occasions, he would push away but defendant would catch him and do it again. Defendant was convicted of five counts of aggravated sexual assault on a child by sodomy and five counts of sodomy with a child.[5] The evidence is sufficient to support those convictions. (*People v. Matute, supra*, 103 Cal .App.4th at pp. 1446-1447; *People v. Crow, supra*, 28 Cal.App.4th at p. 447.)

As to lewd conduct with a child, the victim testified that defendant grabbed the victim's hand, put it on defendant's penis, and made him move his hand. This happened more than five but less than 10 times. Defendant also

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[5] In a subsequent portion of this opinion, we will conclude that the sodomy counts must be reversed.

would touch the victim's "privates" with his hand. This happened more than once but less than five times. Shortly before Charlene took the victim away, after defendant made him watch a pornographic movie, defendant went into the victim's room and touched his privates. The victim later said that defendant touched the victim's privates more than five times. This happened once in the victim's bedroom and the rest of the time in defendant's bedroom. The victim later said that defendant touched the victim's privates around three times in defendant's bedroom and once in the victim's bedroom. Since one conviction for lewd conduct must be reversed (see part IV, *ante*), defendant stands convicted of two counts of lewd conduct with a child. The evidence was sufficient to support those convictions. (*People v. Matute, supra*, 103 Cal.App.4th at pp. 1446-1447; *People v. Crow, supra*, 28 Cal.App.4th at p. 447.)

With respect to oral copulation, the victim testified that defendant would put his mouth on the victim's penis. This happened more than five but less than 10 times. The victim later testified it was around five times. He subsequently said this happened more than five times and around five times. Although defendant was charged with nine counts of oral copulation, the trial court dismissed three counts (§ 1118.1) and the jury could not agree on one count which was dismissed pursuant to section 1385. Therefore, he was convicted of five counts of oral copulation. The evidence was sufficient to support those convictions. (*People v. Matute, supra*, 103 Cal.App.4th at pp. 1446-1447; *People v. Crow, supra*, 28 Cal.App.4th at p. 447.)

VI

The trial court instructed the jury as follows, consistent with CALJIC No. 2.20.1: "In evaluating the testimony of a child ten years of age or younger, you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. A child, because of age and cognitive development, may perform differently than an adult as a witness, but that does not mean that a child is any more or less believable than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child. [¶] Cognitive means the child's ability to perceive, to understand, to remember, and to communicate any matter about which the child has knowledge."

The first paragraph of CALJIC No. 2.20.1 is an instruction that the Legislature has directed must be given upon request of a party in any criminal proceeding in which a child 10 years of age or younger testifies. (§ 1127f.) The last paragraph, and sentence, of the instruction is in addition to the statutory provision.

Defendant contends the instruction dictated by section 1127f and embodied in CALJIC number 2.20.1 is unfair and unconstitutional. We disagree.

The trial court fully instructed the jurors on the factors to consider in determining the believability of a witness and the weight to give testimony.[6] The challenged

[6] The trial court instructed the jurors: "Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. In determining the believability of a witness you may consider anything

(Continued on following page)

instruction merely told the jurors not to discount the testimony of a witness solely because the witness is a child. The contentions defendant makes have been rejected in several decisions of the Courts of Appeal. (*People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1392-1394; *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-456; see also *People v. Jones, supra*, 51 Cal.3d at p. 315.) We also reject the challenge for the reasons stated in those decisions.

VII

Defendant was sentenced to an indeterminate prison term of 150 years to life. This represented a sentence of 15 years to life (doubled to 30 years to life due to his prior serious felony conviction) for each of his five convictions for aggravated sexual assault on a child, to be served consecutively. He was sentenced to a consecutive determinate prison term of 88 years and 8 months. This represented the upper term for the principal offense, digital penetration, and consecutive sentences of one-third the

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that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified; the ability of the witness to remember or to communicate any matter about which the witness testified; the character and quality of that testimony; the demeanor and manner of the witness while testifying; the existence or nonexistence of a bias, interest, or other motive; the existence or nonexistence of any fact testified to by the witness; the attitude of the witness toward this action or toward the giving of testimony; a statement previously made by the witness that is either consistent or nonconsistent with his or her testimony; the character of the witness for honesty or truthfulness or their opposites; an admission by the witness of untruthfulness; the witness's prior conviction of a felony." (See CALJIC No. 2.20.)

middle term for the other convictions, except the five sodomy counts. With respect to the sodomy counts, the trial court imposed upper terms but stayed service of sentence pursuant to section 654.

Defendant contends the imposition of consecutive sentencing and the imposition of the upper term of imprisonment violate the Sixth Amendment to the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (hereafter *Blakely*).

Apprendi held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant; thus, when a court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 542 U.S. at pp. 302-305 [159 L.Ed.2d at pp. 413-414].)

Defendant's claim that consecutive sentencing was improper lacks merit because the rule of *Apprendi* and *Blakely* does not apply to our state's consecutive sentencing scheme. (*People v. Black* (2005) 35 Cal.4th 1238, 1262-1263.)

Section 669 imposes an affirmative duty on a trial court to determine whether the terms of imprisonment for

multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) In most cases, the section leaves this decision to the trial court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 provides that upon the trial court's failure to determine whether multiple sentences shall run concurrently or consecutively, the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun, supra*, 17 Cal.3d at p. 82.) This provision does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid.*) And it does not create a presumption or other entitlement to concurrent sentencing. Under section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result.

The trial court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This

requirement ensures that the trial court analyzes the problem and recognizes the grounds for the decision, assists meaningful appellate review, and enhances public confidence in the system by showing that sentencing decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) However, the requirement that reasons for a sentence choice be stated does not create a presumption or entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under California's sentencing laws is not precluded by the decisions in *Apprendi* and *Blakely*. In this state, every person who commits multiple crimes knows he or she is risking consecutive sentencing. While such a person has the right to the exercise of the court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra*, 542 U.S. at p. 309 [159 L.Ed.2d at p. 417].)

This conclusion is not altered when consecutive sentences are statutorily mandated. *Harris v. United States* (2002) 536 U.S. 545 [153 L.Ed.2d 524] considered a statute that provided a mandatory minimum sentence upon a factual finding by the trial judge, but did not increase the maximum sentence to which the defendant was exposed by the jury's verdict. (*Id.* at p. 551 [153 L.Ed.2d at p. 534].) The court rejected the *Apprendi* approach saying "[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." (*Id.* at p.

558 [153 L.Ed.2d at p. 538].) This is so even where the Legislature has identified the factors to be considered, and even if it has dictated the precise weight to be accorded those factors. (*Id.* at p. 568 [153 L.Ed.2d at p. 545].)

In California, a defendant who is found guilty of multiple offenses is exposed to the possibility of consecutive sentencing. A statute that requires rather than merely permits a consecutive sentence does not implicate the rule of *Apprendi* and *Blakely*.

We reject also defendant's contention that imposition of the upper term violates the rule of *Apprendi* and *Blakely*. In *People v. Black, supra*, 35 Cal.4th at page 1257, our state Supreme Court held that while the middle term is the presumptive sentence under our determinate sentencing scheme, the upper term is the "statutory maximum" for purposes of the rule of *Apprendi* and *Blakely*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In any event, in imposing the upper term, the trial court found in aggravation that the victim was particularly vulnerable and that defendant was on parole when the offense occurred, his prior performance on parole was unsatisfactory, and he has engaged in violent conduct indicating he is a serious danger to society. The court found no factors in mitigation.

The rule of *Apprendi* and *Blakely* does not apply to the fact of a prior conviction (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455]), an exception that cannot be read narrowly and applies to issues of recidivism. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.) The fact that defendant was on parole when he committed the

current offenses is an issue of recidivism based upon defendant's prior conviction. (*Ibid.*)

Since one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), and since the fact defendant was on parole when he committed these offense is such a factor, the trial court's consideration of other factors, in addition to defendant's prior criminal history, did not violate the rule of *Apprendi* and *Blakely*.

VIII

Defendant contends the trial court erroneously believed it was required to order that his indeterminate prison term be served consecutively to his determinate term.

In the probation report, the probation officer advised that the indeterminate term was required to be served consecutively pursuant to section 1170.12, subdivision (c)(2)(B). Defendant correctly notes subdivision (c) of section 1170.12 is applicable when the offender has two or more prior violent or serious felony convictions (strikes). He has just one prior strike conviction.

Nonetheless, the contention must be rejected. Subdivision (a) of section 1170.12 applies where the offender has one or more prior strikes. Pursuant to subdivision (a)(6) and (7), when the accused has current convictions for more than one serious or violent felony, not committed on the same occasion and not arising from the same set of operative facts, "the court shall impose the sentence for each conviction consecutive to the sentence for any other

conviction for which the defendant may be consecutively sentenced in the manner prescribed by law."

Section 667.5, subdivision (c)(4) defines as a violent felony "[s]odomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." Defendant was convicted of five counts of aggravated sexual assault on a child under section 269, subdivision (a)(3). That provision applies when the child is under the age of 14 years and 10 or more years younger than defendant, and defendant commits "[s]odomy, in violation of Section 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." Thus, defendant's five convictions for aggravated sexual assault are current convictions for violent felonies. In addition, violent felonies include lewd acts on a child under the age of 14 years as defined in section 288. (§ 667.5, subd. (c)(6).) Defendant stands convicted of two such offenses.

The trial court found on ample evidence that defendant's current violent felony convictions occurred on separate occasions and did not arise out of the same set of operative facts. Hence, consecutive sentencing was mandatory pursuant to section 1170.12, subdivision (a)(6) and (7). (*People v. Hendrix* (1997) 16 Cal.4th 508, 513 [applying § 667, subds. (c)(6) & (7), which are identical to § 1170.12, subds. (a)(6) & (7)].)

IX

Defendant was convicted in counts 6 through 10 of aggravated sexual assault on a child by sodomy. (§ 269, subd. (a)(3).) He was also convicted of sodomy with a child in counts 19 and 45 through 48. (§ 286, subd. (c)(1).) The

sodomy convictions were based upon the same acts that gave rise to the aggravated assault convictions. The trial court stayed service of sentence on the sodomy convictions pursuant to section 654.

Defendant contends the sodomy counts were lesser included offenses within the aggravated sexual assault on a child counts and, thus, the sodomy convictions must be reversed. The People concede the issue. We agree.

We have previously noted a single criminal act cannot support multiple convictions for both a greater offense and for necessarily included offenses. (*People v. Ortega, supra*, 19 Cal.4th at pp. 692-693.) In that instance, multiple convictions are precluded and only one conviction can stand. (*Id.* at p. 700; *People v. Moran, supra*, 1 Cal.3d at p. 763.) An offense is necessarily included in a greater offense if the statutory elements of the greater offense, or the facts alleged in the accusatory pleading, include all of the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988.)

Under section 269, subdivision (a), aggravated sexual assault on a child is committed when the child is under the age of 14 years and 10 or more years younger than the perpetrator, and the perpetrator commits one of five specified offenses, including, in subdivision (a)(3): "Sodomy, in violation of Section 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person."

Accordingly where, as here, sodomy is alleged as the predicate offense under section 269, the charged offense necessarily includes a violation of section 286. Since, in these circumstances, violation of section 286 is necessarily

included within a violation of section 269, subdivision (a)(3), the convictions for sodomy in violation of section 286 must be reversed.

DISPOSITION

The convictions on counts 5, 13, 19, 45, 46, 47, and 48 are reversed, and the trial court is directed to dismiss those counts. Because service of sentence on counts 19, 45, 46, 47, and 48 was stayed, reversal of those convictions does not affect defendant's total unstayed prison term. Because defendant received consecutive sentences on counts 5 and 13, reversal of those convictions results in a reduction of four years each from his total unstayed determinate prison term. Consequently, the judgment is modified by reducing the total unstayed determinate prison term by eight years to 80 years, eight months. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect this modification, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

SCOTLAND, _____, P.J.

We concur:

BLEASE _____, J.

BUTZ , J.

APPENDIX B

Court of Appeal, Third Appellate District – No. C046314
S144051

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Appellant,

v.

BURNAM LELAND LOWELL, Defendant and Appellant

(Filed Jul. 12, 2006)

Petition for review denied without prejudice to any relief to which defendant might be entitled after the United States Supreme Court determines in *Cunningham v. California*, No. 05-6551, the effect of *Blakely v. Washington* (2004) 542 U.S. 296 and *United States v. Booker* (2005) 543 U.S. 220, on California law.

GEORGE
Chief Justice

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF YOLO

HON. MICHAEL W. SWEET, DEPARTMENT NINE

THE PEOPLE OF THE STATE OF CALIFORNIA Respondent.	)	
vs.	)	Case No 00-0682
BURNAM LELAN LOWELL, Appellant.	)	

REPORTERS' TRANSCRIPT OF PROCEEDINGS

October 11, 2000, June 25, 2001, July 17, 23, 2001, August 22, 2001, September 17, 2001, October 23, 2001, November 5, 27, 2001, April 8, 23, 24, 25, 26, 30, 2002, May 1, 2002, June 7, 18, 25, 2002, August 26, 2002, September 23, 2002, October 7, 22, 25, 29, 30, 31, 2002, November 1, 5, 6, 7, 12, 13, 14, 15, 19, 20, 21, 22, 25, 26, 27, 2002, December 2, 3, 4, 20, 2002, January 13, 2003, March 11, 2003, May 9, 2003, June 23, 2003, January 23, 2004, February 20, 2004

APPEARANCES

FOR THE PEOPLE: DAVID C. HENDERSON,
District Attorney In and for
the County of Yolo
By: PATRICIA LENZI
Deputy District Attorney

FOR THE DEFENDANT: JOSEPH RUSSELL
THOMAS DIXON
Attorneys at Law
3101 1st Avenue
Sacramento, CA 95817

* * *

[2139] She is someone I look up to, because she gets A's and B's on her report card, and got a softball scholarship. Even though, Amy and I get in fights, I still love her, and I think she is a good person to look up to.

Dillon is a good brother. He is a good person to talk to about what happened at school today. He is a good person to talk about my personal or girlfriend life. Even though he is annoying sometimes, I still love him because he's my little brother.

Amy, Mom and Dad inspire me to go to college and get a good job. I want you to know that I want to be a police office or on the SWAT team. I want to be in law enforcement, because I want to help and protect people from bad.

I appreciate what everybody has done for me. I like to thank Mom and Dad, Pat and Karen for helping me with this whole thing in Court.

Love, Burnam Lowell, Junior."

THE COURT: Thank you. Any other comments?

MS. LYNDSEY: No, Your Honor.

THE COURT: Okay, in terms of this probation report, I have read it. Mr. Nicholson, you re in receipt of copy?

MR. NICHOLSON: Yes, Your Honor.

THE COURT: Any comments?

MR. NICHOLSON: I would ask the Court to exercise its discretion, where available, to run concurrent any available offenses?

[2140] I know that the probation department has recommended consecutive terms for Counts – essentially, for Counts 27 through 44, the animal abuse Counts. I recommend – or request, that those go concurrent.

However, I don't think the Court has very much discretion in certain of the other Counts as to whether or not they are at a minimum would result with the 30 to life to strike on certain Counts. And if those Counts are run consecutive we get to a 90.

I believe that the recommendation is for somewhere in the neighborhood of 222. Which is beyond the natural life span of any person, so . . .

THE COURT: What I did is re-reviewed the Counts with the testimony, to make sure that the recommendation of probation was appropriate under the law. And I do note that probations recommendation was that the Court pronounce a sentence on Counts 45 through 48, the Sodomy with a person under 14 years. And that would be stayed pursuant to 654, because of the convictions in

Count 6 through 10 inclusive, the aggravated sexual assault.

And I re-looked at the jury instruction that I had given on the aggravated assault, which as you know, carries a 15 to life term per Count. And I do note that the 269 was based on the act of Sodomy in violation of Penal Code Section 286(c)(2).

So in reviewing that, I believe probation was exactly right, that those 45 through 48 Counts should

[2141] be stayed at 643.

I looked at the other sexual assault Counts, specifically, 3, 4, and 5. Which were the penetration by foreign object. And the testimony appears to encompass more than even the charged Counts. So there would not be, in my view, any illegality in pronouncing consecutive terms for those Counts, because they occurred at separate times. And they are not part of a pattern. They appear to be no indivisible.

Also, the Counts 11, 12, and 13 are the Lewd Lascivious Act on a child under 14, 288(a). And note that those Counts encompass the conduct described where by the defendant would put his hand on the victim's privates, or he would — defendant would grab the victim's hand and make the victim place his hand on the defendant's privates. And the testimony reflects more than the Counts that he was convicted of regarding the 288(a).

And I reviewed the Counts 15 through 18 and Count 20. Which involved the oral copulation with a person under 14, in violation of 288(a)(c)(1), and note that the testimony involved those acts more than, or at least, the number of times reflecting the conviction.

And then the Counts 27 through 44, the abusing an animal Counts. I note that the — there was many pictures. Much discussion of what the condition of the animals were. And note that the Counts involved 18 animals. And the jury acquitted on 3 counts, 24, 25, and 26, and convicted on the other 18 abusing an animal

[2142] counts, one per Count.

So they also do not appear to suffer from any 654 issues.

The request to run some of those concurrent, I guess would be in the interest of justice.

MR. NICHOLSON: Yes.

THE COURT: And the rather large sentence that is being recommended. But in terms of the sexual assault Counts, they do not appear to involve any issues of concurrent term or 654, other than what I have indicated.

And of course, Count 1, there is a recommendation to run that concurrent with Count 11. Believing those acts occurred at the same time were so close in time as to represent a single period of aberrant behavior. Of course, Count 1, the criminal threats against Ms. Schaible. That is clearly a separate act that would warrant a consecutive term.

So I looked for those, because that, to me, was the most difficult part of the case, is making sure that I could pronounce sentence on the Counts I plan on pronouncing sentence, and I'm satisfied that I can.

Ms. Lyndsey, any comments?

MS. LYNDSEY: With regard to the consecutive sentencing as to the animals, there were 18 separate animals, so we would ask for that to be consecutive. Note that three of them were killed. So there is reason to have it consecutive.

[2143] And also I would respectfully disagree with the recommendation of probation with regard to running the conviction for Penal Code Section 288.2, Count 1, concurrent with 289(j) in Count 3, I don't think that's appropriate, given that the child saw pornography on more than one occasion.

So I believe that that should be run consecutively.

I have some comments with regard to a couple of other points, but would ask the Court when is the appropriate time to deal with it?

THE COURT: Probably now. I think the recommendation on Count 1 was with Count 11; is it?

MR. LOWAN: Yes.

MS. LYNDSEY: Is it? I was looking at the bottom of page 11 saying 288.2, Count 1 concurrently with Count 3 on page 11, is how — is where I read that.

THE COURT: I'm looking on page 10, line 3. I think the idea would be the same, whenever these movies were watched. Subsequent act of a sexual nature occurred. I would, with all frankness, I don't think it's going to matter a whole lot.

MS. LYNDSEY: Okay.

THE COURT: But I thought of that as well. Because, I think technically, they probably could warrant

a consecutive term. I could see that, based on the testimony. That's — so I actually came up with a little different calculation, based on that. But in the scheme

[2144]

of things, it's a fairly mute point. But at any rate —

MS. LYNDSEY: That, I thought.

THE COURT: – anything disparaging, don't think that's wrong?

MS. LYNDSEY: Not at all.

THE COURT: We're looking at the extraordinary term. Four years, five years, eight months, isn't going to make that much difference. But I understand.

MS. LYNDSEY: I also believe that aides testing is appropriate in this case.

THE COURT: I think it's recommended.

MS. LYNDSEY: Is it, okay.

And then I can't recall which Penal Code Section it is. But in a case like this, I believe, we're required to order no visitation.

THE COURT: 1202.05.

MS. LYNDSEY: And then the fee for impoundment of the dogs was calculated as of September 17th, '03. So I believe that fee will probably be higher. So I would ask that that be subject to being addressed.

It's on page 13, line 5. That was calculated as with the sentencing – presentence credits as of September 17th. And I'm sure that probation has credits as of today. But I

don't know about the fees. And that's probably quite a bit more.

THE COURT: I imagine it is. Does anybody have any information on that?

[2145] MS. LYNDSEY: No.

THE COURT: Well, I can do a restitution "to be determined," and probation can —

MR. LOWAN: We can look into that.

THE COURT: Okay, anything else?

MS. LYNDSEY: No.

THE COURT: Probably going to take a while to do this. So . . .

MR. NICHOLSON: Your Honor, with respect to the visitation, I want to clarify. That, only is in regard to Burnam Rance Lowell?

THE COURT: The limitation?

MR. NICHOLSON: The limitation —

THE COURT: No.

MS. LYNDSEY: Not under the statute, it does not.

MR. NICHOLSON: And that's until he's an adult, I would assume. Since it's his child-victim.

THE COURT: Yeah, let me double check. Under the age of 18.

MR. NICHOLSON: Okay.

THE COURT: You are right.

Okay, and probation, in terms of arriving at consecutive terms, has determined that the events are for different times and different places, so it's not a single aberrant behavior? That involved separate acts. Which I agree with, they are distinct. They are warranted by consecutive terms.

[2146] And in terms of the Counts that are either going to be run concurrent, which I will go over one of these, or the principle terms on the determinate sentence, probation has followed the rules of Court and found that circumstance in aggravation outweigh those in mitigation, and have listed the aggravating factors. Which are; victim was particularly vulnerable; defendant was on parole at the time of the offense; performance on parole was unsatisfactory. And it's clear he engages in violent conduct indicating he is a serious danger to society.

And I will not find the mitigating factor as indicated that he had a minimal record. Because he has a strike. So that is not a minimal criminal record to me. So there are no mitigating factors. So the imposition of the upper base term is clearly warranted by the Court finding no factors in mitigation.

So for Count 6, which is a violation of Penal Code Section 269(a), aggravated sexual assault of a child the statute requires a term of 15 years to life. That would be doubled to 30 years to life. Because the Court found Mr. Lowell had suffered a prior conviction case enhancement C, under Provision Penal Code Section 667(e)(1).

And Count number 7 is the same offense 269(a). That also warrants 30 years to life for the reason previously stated.

Count 8 also for his conviction of 269(a) aggravated sexual assault on a child, it's 30 to life.

[2147] Same reason.

Same for Count 9.

And same for Count 10. So that's 150 years to life as an indeterminate term. Terms of the determinate term in Mr. Lowan's report is correct under 17712(2)(b) indeterminate shall be served consecutive to any other term of imprisonment. So there is remaining Counts require a determinate term. And probation has selected Count 3 as the principle term. Correct, Mr. Lowan?

MR. LOWAN: Yes, Your Honor.

THE COURT: All right, that is a conviction of 289(j), which is penetration of genital or anal opening of a person under 14 years of age by a foreign object. That carries a triad of 2, 6, or 8 years.

And the probation report has separately indicated on page 8 of the report that factors in aggravation are the victim was particularly vulnerable being his, the defendant's son.

The defendant engaged in violent conduct, indicating a seriousness of violent conduct. He was on parole at the time, and his performance was unsatisfactory.

Just by imposition of the upper base term, which is 8 years. Again, that would be doubled because of the prior

strike position. That's 16 years on this determinate term. And the Court will deem that to be the principle term.

[2148]

Count 4, also a conviction of 289(j). That will be deemed a subordinate term, and consecutive to Count 3. That would be eight months doubled, for 16 months.

And Count 1, the violation of 288.2 distribution or exhibition of lewd material to a minor, the Court is going to run that to subordinate and consecutive as well. Find that that occurred different from the sexual assault offense. So that's a 16, 2, 3. So the Court would impose one-third middle base term, would be 8 months, doubled to 16 months.

Count 11, conviction of 288(a) Lewd Lascivious Act on a child under 14. That would deemed subordinate, and consecutive to the term previously imposed as a principle term that is 3 6 8. So it's two years double because of the strike. So that's four years.

And the same sentence for Count 12. Same offense 288(a).

Same sentence for Count 13, 288(a). So that's four years as well. Same reasons subordinate, consecutive thereto.

Count 14 jury found him not guilty.

Count 15 is a violation of Penal Code Section 288(a)(c)(1), oral copulation with a person under 14 years of age. That is all 3 6 8 offense.

Court's going to impose that subordinate and consecutive thereto, for the reasons previously stated. So that

would be four years. One-third middle [2149] base term is two, doubled because of the strike, for four years.

Count 16 convicted of the same offense 288(a)(c)(1). Same sentence, four years. Subordinate and consecutive thereto.

Same sentence in Count 17, four years.

And Count 18, same sentence. Same offense 288(a)(c)(1), four years.

Count 19 is the Sodomy with a person under 14 years of age, violation 288(c)(1). For the previously stated reason, the Court is going to impose the upper base term of 8 years, having previously articulated the factors in aggravation outweighing the factors in mitigation. And the Court's going to stay the pronouncement of the 8 years, pursuant to Penal Code Section 654.

Count 20, conviction of 288(a)(c)(1), same as Count 15 through 18. Same sentence. Which would be subordinate, consecutive thereto. Which would be four years. 3, 6, 8 is the triad. One-third middle base, two. Doubled to four, because of the strike.

Mr. Lowell was found not guilty, by jury, as to count 24 through 26. As indicated previously, the Counts dismissed 21 through 23 inclusively, pursuant to 1118.1.

Brings us to the animal abuse Counts 27 through 44 inclusive. He was convicted 597(b) of the Penal Code, killing wounding or torturing an animal, a Felony. There are 18 separate animals involved. The [2150] Court will impose a subordinate and consecutive terms. The triad is 16, 2, 3, for each of those Counts. Obviously one-third

middle base term would be eight months, doubled to 16 months because of the strike.

So 16 months consecutive, for Counts 27 through and including Count 44.

Count 45 is the Sodomy with a person under 14 years of age, convicted of 286(c)(1). For the reasons previously given regarding Count 19, the Court is going to impose eight years sentence. And stay that, pursuant to 654.

And same sentence for Count 46. Also 286(c)(1). Same reasons, eight years. But that will be stayed concurrent. Actual stay, pursuant to 654.

Count 47 same sentence. That's also conviction of 286(c)(1), upper base term, eight years. For the reasons previously given, but then, stayed pursuant to provisions of 654.

And Count 48 same offense, 286(c)(1). And same sentence, base term, eight years. Stayed pursuant to 654.

Court found the defendant had in fact suffered a prior prison term contained with enhancement A, violation of 667.5(b). Court will now pronounce that sentence of one year consecutive.

And Court previously found that Mr. Lowell's habitual criminal behavior 667(a)(1), that warrants an additional five year term.

[2151] Mr. Lohan is correct in his reports that imposition of both enhancement is allowable. Mr. Lohan, is that correct?

MR. LOHAN: Yes, sir.

THE COURT: What total did you get?

MR. LOWAN: Well, I was starting to go on with your two – I originally had 222 years. I'm sorry, 72 years four months. However, the Court has now imposed an additional 16 months to that. So we would be at 73 years eight months.

Yes, it appears determinate term would be 73 years eight months.

THE COURT: All right, so your total is what?

MR. LOWAN: I think I come up with 73 years eight months on determinate.

THE COURT: Anybody have a different calculation?

MR. NICHOLSON: That's including the six years on the end?

THE COURT: It should.

MR. LOWAN: No, it's not including that.

THE COURT: I thought it was 80 years eight months.

MR. LOWAN: I'm getting to 81.4.

THE COURT: All right, let me —

MS. LYNDSEY: Let me see.

THE COURT: On the 16 months terms, I show [2152] 26 years 8 months. Does everybody agree with that?

MS. LYNDSEY: Yes.

MR. LOWAN: Yes.

THE COURT: Okay.

MS. LYNDSEY: And there is one 16 year term. And then on the four year terms, I counted 14 of those imposed.

THE COURT: Yes.

MS. LYNDSEY: Your Honor.

THE COURT: Yes.

MS. LYNDSEY: On the four year terms, that would have been Counts 4, 5, 11, 12, 13, 15, 16, 17, 18, 20.

THE COURT: I got 10 as well. So that's 40, right?

MS. LYNDSEY: Right.

MR. LOWAN: Right.

THE COURT: Then six for the enhancement.

MS. LYNDSEY: Okay, that's where I'm off.

THE COURT: What are we missing?

MS. LOWAN: No.

THE COURT: The Third District will tell us.

THE CLERK: 21. –

THE COURT: 21. I thought we agree 26 years for that.

THE COURT: 1, 2, and then 18, 27, through 44. That's 20.

[2153] THE CLERK: Count 18.

THE COURT: No, 27 through 44, 18 times 16. 18 plus 2 is 20.

MR. NICHOLSON: Your Honor, do you think we should go off the record?

THE COURT: I agree

(Discussion off the record.)

THE COURT: All right, let's go back on the record.

So the determinate term is 88 years 8 months. The indeterminate term is 150 years to life. That's 238 years 8 months to life. Does everybody agree with that.

MS. LYNDSEY: Yes.

THE COURT: Not whether you agree with the sentence, but whether you agree with my math?

MR. NICHOLSON: My math was different, Your Honor. But, as you said, I'm certain the Third DCA will tell us in you are wrong.

THE COURT: What did you get?

MR. NICHOLSON: I had 81 and 4.

THE COURT: Let's go off the record.

(Discussion off the record.)

THE COURT: Okay, we're back on the record. [2154] It's 88 and 8. Yeah, it appears the determinate 88 years 8 months. 150 years to life is indeterminate. The aggregate thereby, would be 238 years 8 months to life.

Court will also order restitution – or, the impound fees in the amount to be determined. Impose the 1202.1 Aides testing. And the 1202.05 prohibition against visitation between the victim, Burnam Rance Lowell and the defendant, while he is under age 18. Will impose the restitution fines as recommended by probation of $10,000 pursuant to Penal Code 1202.4(b). Will impose the standard statutory restitution fine $200, pursuant to 1202.45.

Updated credits?

MR. LOWAN: Yes, Your Honor, as of today 459 actual days, conduct credits are limited by 2933.1 Penal Code to 68 days. We have a grand total of 527 days.

THE COURT: All right, those will be awarded as of today.

Okay, and Mr. Nicholson, do those credits appear to be accurate?

MR. NICHOLSON: The credits appear to be accurate, Your Honor. I will note with the fines and the restitution, obviously Mr. Lowell, is incapable of working, and has been for two years now. So it's unlikely that he's going to be able to pay any of that.

THE COURT: I would agree with that.

MS. LYNDSEY: Your Honor, we do need to add restitution amount to be determined for the victims.

* * *

APPENDIX D

Relevant State Statutory and Rule Provisions

California Rules of Court:

Rule 4.420. Selection of base term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking

the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.

Rule 4.425. Criteria affecting concurrent or consecutive sentences

Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

(a) [Criteria relating to crimes] Facts relating to the crimes, including whether or not:

(1) The crimes and their objectives were predominantly independent of each other.

(2) The crimes involved separate acts of violence or threats of violence.

(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

(b) [Other criteria and limitations] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences.

California Penal Code Provisions:

§ 667. Habitual criminals; enhancement of sentence; amendment of section

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions

as defined in subdivision (d), the court shall adhere to each of the following:

* * *

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

* * *

§ 669. Conviction of multiple offenses; direction for concurrent or consecutive terms; life term; proceeding on discovery of prior conviction after sentence for subsequent offense; duty of department of corrections

When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or

with any other term of imprisonment for a felony conviction. Whenever a person is committed to prison on a life sentence which is ordered to run consecutive to any determinate term of imprisonment, the determinate term of imprisonment shall be served first and no part thereof shall be credited toward the person's eligibility for parole as calculated pursuant to Section 3046 or pursuant to any other section of law that establishes a minimum period of confinement under the life sentence before eligibility for parole.

In the event that the court at the time of pronouncing the second or other judgment upon that person had no knowledge of a prior existing judgment or judgments, or having knowledge, fails to determine how the terms of imprisonment shall run in relation to each other, then, upon that failure to determine, or upon that prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of 60 days from and after the actual commencement of imprisonment upon the second or other subsequent judgments, the court shall, in the absence of the defendant and within 60 days of the notice, determine how the term of imprisonment upon the second or other subsequent judgment shall run with reference to the prior incompleted term or terms of imprisonment. Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently.

§ 1170. Determinate sentencing

* * *

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

§ 1170.12. Prior felony conviction; enhancement

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior

felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

* * *

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

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